LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 29 1952
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA,

Appellant,

vs.

BRUCE G. BARBER, INDIVIDUALLY AND AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE THIRTEENTH IMMIGRATION DISTRICT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

ALLAN BROTSKY,
Counsel for Appellant,

GLADSTEIN, ANDERSON & LEONARD,
Of Counsel.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	1
Questions presented	2
The statute involved	3
Statement of the case	5
The questions are substantial	8
Appendix "A"—Judgment of the District Court	14

Table of Cases Cited

American Communications Assn. v. *Douds*, 339 U.S. 382, 70 S. Ct. 674	9
Cummings v. *Missouri*, 4 Wall. 277, 18 L. ed. 356	9
Garland, Ex parte, 4 Wall. 333, 18 L. ed. 366	9
Harisiades v. *Shaughnessy*, 72 S. Ct. 512	2, 11
I. W. O. v. *McGrath*, 341 U.S. 123, 71 S. Ct. 624	12
McGrath v. *Kristensen*, 340 U.S. 162, 71 S. Ct. 224	2, 13
United Public Workers v. *Mitchell*, 330 U.S. 75, 67 S.C. 556	2
United States v. *Lovett*, 328 U.S. 309, 90 L. ed. 1252	8
Williams v. *Fanning*, 332 U.S. 490, 68 S. Ct. 188	13
Wong Yang Sung v. *McGrath*, 339 U.S. 33, 70 S. Ct. 445	5

Statutes Cited

Administrative Procedure Act, 5 U.S.C.A. 1009	2, 3, 7
Constitution of the United States:	
Article I, Section 9, Clause 3	7
First Amendment	3, 6, 12
Fifth Amendment	7, 12, 13
Internal Security Act of 1950, 64 Stat. 1006, 8 U.S.C.A. 137(2)(c), and 64 Stat. 1006, 8 U.S.C.A. 137-3	2

Labor-Management Relations Act of 1947
Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781, et seq.

United States Code:

Title 5, 1009 ..... 2, 3
Title 8, 137 (2) (c) 3
Title 8, 137-3 ..... 3, 4
Title 28, 1253 .....
Title 28, 2201 .....
Title 50, 781 2
Title 50, 782 .....

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

2, 3, 7
3, 6
3, 4, 6
2
2
2, 4
2

No. 31,671

WILLIAM HEIKKILA,

Plaintiff,

vs.

BRUCE G. BARBER, ETC., ET AL.,

Defendants.

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court, as amended, plaintiff-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The decision of the District Court for the Northern District of California, Southern Division, is unreported. No opinion was written. A copy of the judgment of the Court is attached hereto as Appendix "A".

Jurisdiction

The judgment of the District Court was entered on August 4, 1952. A petition for appeal is presented to the District Court herewith on September 3, 1952. The jurisdiction of the Supreme Court to review the decision by

direct appeal is conferred by Title 28 United States Code, §§1253 and 2201, and 5 USC §1009. The following decisions, among many others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Harisiades v. *Shaughnessy*, — U. S. —, 72 S. Ct. 512
McGrath v. *Kristensen*, — U. S. —, 71 S. Ct. 224
United Public Workers v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556

The judgment appealed from is the judgment of a three-judge district court, convened because the complaint directly attacked the constitutionality of certain sub-sections of the Internal Security Act of 1950, to wit, 64 Stat. 1006, 8 USCA §137(2) (C), and 64 Stat. 1006, 8 USCA §137-3.

Questions Presented

The principal question presented by this case is whether Congress has the power to provide, as it has done in the statutes here attacked, for the deportation of an alien who has been found to have been at any time since his entry into the United States a member of the Communist Party. This statute is attacked as a bill of attainder and an ex post facto law prohibited by the Constitution.

An additional question is whether in the face of undenied allegations that the plaintiff does not and never did advocate the overthrow of the Government of the United States by violence or by any unconstitutional means, that the Communist Party of the United States did not during the period when the plaintiff was alleged to have been a member advocate or advise the overthrow of the Government of the United States by force, violence, or other unconstitutional means, nor was it a Communist organization as those terms are used in 50 USC 781, 782, et seq. (portions of the Internal Security Act of 1950), the District Court may grant the

defendants' motion to dismiss, thus depriving the plaintiff of a trial on the merits.

This case also presents a question of whether a final order for deportation and the threatened execution of that order by a District Director of Immigration may be reviewed by a suit brought in the District Court for an injunction, for declaratory relief, and for a review under the provisions of the Administrative Procedure Act, 5 USCA §1009.

An additional important question is whether the statutes here attacked contravene the guarantee of free speech contained in the First Amendment to the Constitution of the United States, since in this case an undenied allegation of the complaint is that the Communist Party during the period when the plaintiff is alleged to have been a member of it did not advocate the overthrow of the Government by force, violence or other unconstitutional means.

Additional questions noted in the assignment of errors may be urged in briefs and argument before the Supreme Court of the United States.

The Statute Involved

This case attacks certain sub-sections of the Internal Security Act of 1950. The portions directly attacked are 64 Stat. 1006, 8 USCA §137(2) (C), and 64 Stat. 1006, 8 USCA §137-3, which provide as follows:

§137(2) (C):

"any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * * * * *

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * * * *

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical sub-division of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;"

§137-3:

"(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in paragraphs (1) or (3) of section 137 of this title or * * * a member of any one of the classes of aliens enumerated in section 137(2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in sections 137 to 137-8 of this title, irrespective of the time of their entry into the United States."

Also important for consideration are those provisions of the Internal Security Act of 1950 which define Communist organizations and which provide for the determination of what organizations fall within those definitions by a board specially provided for that purpose. These sections are designated by the short title of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 USC 781, et seq.

Statement of the Case

Plaintiff-appellant was born in Finland in 1906 and came to the United States about the age of 2½ months with his parents. He has ever since his arrival resided in the United States. In 1947 a warrant was issued for his arrest, charging him with violation of the Immigration laws of the United States in that he was alleged to be a member of an organization which believed in, advised, advocated, or taught the overthrow of the Government by force, violence or other unconstitutional means, as proscribed by the provisions of 8 USC § 137. Hearings were held in 1949 before a hearing officer of the Immigration and Naturalization Service under the charge contained in that warrant. These hearings did not conform to the requirements of the Administrative Procedure Act, 5 USCA § 1001, et seq. Subsequently, by reason of the decision of the Supreme Court of the United States in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 70 S. Ct. 445, those hearings were abandoned by the Immigration Service and new hearings were instituted before a Hearing Examiner who purported to be appointed under and to be conducting the hearings in accordance with the provisions of the Administrative Procedure Act. These hearings were held in 1950, commencing in June and continuing for a number of months. The hearing officer had before his appointment as a Hearing Examiner been an employee and officer of the Immigration and Naturalization Service for many years and had conducted investigations, prosecutions, and hearings of aliens in that capacity. The complaint alleges that the Hearing Examiner was not an impartial hearing officer in accordance with the requirements of the Administrative Procedure Act.

During the course of the hearing the plaintiff was asked whether he was a member of the Communist Party. He

testified that he was not. He then refused to testify abou his membership during the years 1929 to 1939. There wa then introduced in evidence, over plaintiff's objections portions of the transcript of the testimony taken at th 1949 hearing in which plaintiff had under oath testified re garding his membership in the Workers Party and the Communist Party during the years 1929 to 1939. After the admission of this evidence a new charge was lodged against plaintiff, charging him with a violation of 8 USCA §§ 137(2)(C) and 137-3, in that he was alleged to have been since his entry into the United States a member of the Communist Party. All evidence relating to the nature of and the aims or objectives of the Communist Party was stricken from the record, the decision of the hearing officer was confined to the lodged charge and supported only by the testimony given at the 1949 hearing. The plaintiff's offer to prove that he had not advocated the overthrow of the Government, and that neither the Workers Party nor the Communist Party had during the period when he was alleged to have belonged advocated such overthrow of the Government, was denied.

An order of deportation was recommended by the hearing officer, and this recommendation was sustained through the usual administrative appeals, so that there was on January 11, 1952, a final order entered for the deportation of plaintiff, solely upon the ground that he had been found to have been a member of the Communist Party since his entry into the United States.

Plaintiff sought to prevent his deportation by an action against the District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, the defendant Bruce G. Barber, and all persons acting under his direction, or in concert with him, and the successors of the defendant or any other defendants. In addi-

tion to temporary and permanent injunctions, plaintiff sought by this complaint a declaration of rights, alleging that there existed a controversy between plaintiff and the defendants in that the plaintiff maintained that the acts and threatened acts of the defendants were illegal and void, while the defendants maintained that their actions and threatened actions were lawful in all respects.

Plaintiff also sought a review of the action of the defendant Bruce G. Barber under provisions of the Administrative Procedure Act, 5 USCA § 1009.

The complaint set forth the above facts and alleged also that plaintiff has pending before a state court a petition for naturalization.

The complaint alleged that the statute under which his deportation had been ordered was unconstitutional and void as a bill of attainder and an ex post facto law prohibited by the provisions of Article I, Section 9, Clause 3 of the Constitution of the United States, and a deprivation of the guarantees of free speech and free press contained in the First Amendment to the Constitution of the United States, and of the guarantees of due process of law contained in the Fifth Amendment to the Constitution of the United States. It was also alleged that the use of the testimony from the 1949 hearing, as the sole evidence to support the deportation order, was a violation of the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States.

The complaint alleged that a three-judge court would be required for adjudication of this cause.

Upon the filing of the complaint a three-judge court was convened by Judge Clifton Mathews of the Court of Appeals for the Ninth Circuit, and a hearing was set for August 1, 1952. Thereupon the defendant filed a motion to dismiss the complaint upon the ground that the complaint

failed to join an indispensable party, to wit, the Commissioner of Immigration and Naturalization. The motion was also based upon the ground that the complaint fails to state a claim upon which relief can be granted, in that the issues raised by the complaint are moot since the plaintiff had been accorded a fair hearing; that the statutes attacked are constitutional; and that the plaintiff had an adequate remedy at law.

Upon these pleadings, and the affidavit of George R. Andersen in support of the complaint (which set forth with some particularity the facts surrounding the introduction of the testimony from the 1949 hearing), the cause was argued before a three-judge court consisting of Judges Clifton Mathews, Louis E. Goodman, and Oliver J. Carter. The court entered its judgment on August 4, 1952, denying a temporary injunction, granting the defendants' motion to dismiss, and ordering the dismissal of the complaint. No opinion was written.

The Questions Are Substantial

The primary question presented by this case is whether Congress has sought to enact a bill of attainder when it provided that an alien who has been found to be at any time since entry a member of the Communist Party, without any other evidence whatsoever, may be deported from the United States. The familiar and definite definition of a bill of attainder appears in *United States* v. *Lovett*, 328 U. S. 309, 513, 90 L. Ed. 1252, 1259:

> ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."

The court there condemned as a bill of attainder a statute which prohibited the payment of money for wages to cer-

tain named individuals who had been employed by the Government, the effect of which was to permanently bar those individuals from government service. The court relied upon the foundation cases on the subject: *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356, and *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366. In those cases the court held unconstitutional as bills of attainder statutes which required persons to take an oath of loyalty as a prerequisite to following the profession of priest and lawyer.

The statutes attacked here are of precisely the same nature as the statutes held invalid in those cases. Members of the Communist Party, present or former, regardless of their personal beliefs, activities, present status as to membership, and regardless of the nature of the Communist Party, its purposes, activities, and principles, may upon proof of membership to the satisfaction of an administrative tribunal, without more, be banished from this country.

The question is not whether Congress has the plenary power to require the deportation of all aliens; in fact, it is not a question of the power of Congress over aliens at all. It is a question whether the Constitution excludes from the power delegated to Congress, the power to impose penalties without judicial trial, by legislative acts for any purpose. The question is not whether Congress has the power in a proper case to require the deportation of aliens deemed by it to be hurtful to the country; it is a question whether such deportation may be accomplished by a legislative act which is a bill of attainder.

The latest decision by the Supreme Court on bills of attainder is in *American Communications Assn. v. Douds*, 339 U. S. 382, 70 S. Ct. 674. The court there rejected the argument that the provisions of the Labor-Management Relations Act of 1947 constitute a bill of attainder insofar

as they required the filing by trade union officials of affidavits stating that they were not members of the Communist Party. The court distinguished the *Lovett, Garland* and *Cummings* cases, and its distinction is illuminating in this case. The court said with regard to those cases:

> ". . . . But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. . . . . .
>
> "This distinction is emphasized by the fact that members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See United States v. Lovett, supra, 328 U. S. at page 314, 66 St. Ct. at page 1078, 90 L. Ed. 1252; Cummings v. Missouri, supra, 4 Wall. at page 327, 18 L. Ed. 356. Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder" 70 St. Ct. at 691-692.

The distinction set forth by the Supreme Court there has no application to this case, and it points to one of the principal evils of the statute under attack. Under this statute punishment is visited upon past conduct; past conduct is a bar to further residence in the United States;

nothing the alien can do can ever change the result; there is no possibility that he may by voluntary alteration of the loyalties which impel him to action become eligible to remain in the United States.

A related question is whether the statutes under attack here are invalid as *ex post facto* laws. Granted that the prohibition against *ex post facto* laws has in the most recent decision of the court on the subject been held inapplicable to deportation; see *Harisiades* v. *Shaughnessy*, — U. S. —, 72 St. Ct. 512, the policy of the founders of our nation in prohibiting *ex post facto* laws would appear to have been directly aimed at such legislation as the statutes under consideration here. It is difficult to imagine what could be more akin to a criminal penalty than the banishment of an alien like the plaintiff, who has since he was two and one-half months old known no other country than the United States.

The statute, if it is rational, proceeds upon the clearly untenable theory that one who has at any time, even for a single day or perhaps for a single hour, been a member of a proscribed organization, bears within him from that moment forward through all his years a germ of unlawful revolt so dangerous to the security of the United States that he must be banished from the United States without any consideration of his subsequent conduct, belief, activities, contributions to the common welfare, adherence to the Constitution of the United States, and without the safeguard of a judicial trial. No theory of psychology, nor any facts known to Congress could possibly support this preposterous theory of perseveration. Adherence to political ideas or political groups is not an ineradicable, attaining, self-perpetuating act.

A second substantial question presented by this case is whether a district court may dismiss, without a trial on-

the merits, an action such as this one, in which the undenied allegations of the complaint allege that the Communist Party from 1929 to 1939 did not advocate the overthrow of the Government by force and violence. The opinion of the Supreme Court of the United States in *I. W. O.* v. *McGrath*, and its companion cases, 341 U. S. 123, 71 S. Ct. 624, emphasizes the necessity for taking as true the undenied allegations of a complaint to which a motion to dismiss alone is interposed. Taking the allegations as true in this case, the decision here appealed from allows the deportation of an alien who is not and has never been an advocate of the overthrow of the Government by force and violence, who has never belonged to an organization which so advocated, who has always regarded himself as a national or citizen of the United States, and who is presently seeking to have the privilege of American citizenship conferred upon him. Unless Congress has the power to require the deportation of such an alien because he has been a member of an organization which does not advocate the overthrow of the Government, this decision is a manifest violation of due process of law, both substantive and procedural.

In *Harisiades* v. *Shaughnessy*, *supra*, the Supreme Court held that the guarantee of substantive due process in the Fifth Amendment does not preclude deportation of those who belong to organizations which did advocate the overthrow of the Government by force and violence. It held also that the First Amendment does not prohibit deportation for membership in such an organization. Impliedly, the First Amendment would and should prohibit deportation for membership in an organization about which no more is shown in the evidence than its name.

Inextricably linked with the question last discussed is the question whether the plaintiff may obtain by the

method he here sought to employ, a review of the action of the defendant under the provisions of the Administrative Procedure Act or the declaratory judgment statute. The order of deportation in this case had become final. Were he in detention, he could test that order by petition for *habeas corpus*. By the decision here appealed from the District Court has held that he may not attack the deportation order by a complaint for injunction, by an action for declaratory relief, or by an action for review under the Administrative Procedure Act. This Court has held in *McGrath* v. *Kristensen*, 340 U. S. 162, 71 S. Ct. 224, that the decision of the Attorney General in an alien case may be reviewed not only by *habeas corpus*, but also by an action for declaratory judgment. The decision of the District Court in the case at bar appears to be directly in conflict with that Supreme Court decision. Furthermore, if the rationale for the District Court's decision was that there was an indispensable party who had not been joined in the action, the decision appears to be in conflict with the Supreme Court's decision in *Williams* v. *Fanning*, 332 U. S. 490, 68 S. Ct. 188.

Other substantial questions reserved in the assignment of errors include the question of the application of the prohibition of self-incrimination of the Fifth Amendment, the application of the guarantee of freedom of speech contained in the First Amendment, and the application of the guarantee of due process of law contained in the Fifth Amendment to deportation proceedings not conducted in conformance with the Administrative Procedure Act.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,
By (Sgd.) ALLAN BROTSKY,
Counsel for Plaintiff-Appellant.

September 3, 1952.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31,671

WILLIAM HEIKKILA,

Plaintiff,

vs.

BRUCE G. BARBER, Individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District; JOHN DOE ONE, through JOHN DOE TEN, inclusive,

Defendants

JUDGMENT

William Heikkila, plaintiff herein, having applied to a judge of this court for an interlocutory injunction restraining the enforcement, operation and execution of an Act of Congress for repugnance to the Constitution of the United States, and Bruce G. Barber, defendant herein, having moved to dismiss this action, and said application and motion having been heard by this court of three judges under section 2284 of Title 28 of the United States Code, and this court having concluded that said motion should be granted, it is hereby ordered, adjudged and decreed that said motion be, and it is, hereby granted, that this action be, and it is, hereby dismissed, and that said defendant Barber recover his costs.

Dated August 4, 1952.

/S./ CLIFTON MATHEWS,
United States Circuit Judge;
/S./ LOUIS E. GOODMAN,
United States District Judge;
/S./ OLIVER J. CARTER,
United States District Judge.